NTSB Order No.
EM-51

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 14th day of June 1976.

O. W. SILER, Commandant, United States Coast Guard,

vs.

WILLIAM GILBERT BURKE, Appellant.

Docket ME-49

OPINION AND ORDER

The appeal herein is from a decision of the Commandant affirming the revocation of appellant's license (No. 443686) and merchant mariner's document (No. Z-85548-DI) on grounds of mental incompetency.[1]

Appellant was charged with incompetence at the end of a voyage aboard the SS MISSOURI, a United States merchant vessel on which he had served as second mate, acting under authority of his license and document. In prior proceedings, a hearing before Administrative Law Judge Thomas McElligott was followed by the law judge's initial decision, which appellant thereafter appealed to the Commandant (Appeal No. 2021).[2] Appellant has been represented throughout by his own counsel.

The law judge found that on November 3, 1973, appellant made course changes on the vessel's charts while he was the officer on watch without advising the master; that the master discovered a mistake made on the charts during the watch which showed the vessel heading into the coast of Africa whereas the proper course ran parallel to the coast; that the master also determined that appellant was responsible for these changes by questioning the quartermaster on watch; and that appellant had given orders to the engine room to stand by for maneuvering into port although the

[1]The Commandant's decision is subject to review on appeal to this Board under 49 U.S.C. 1903(a)(9)(B).

[2]Copies of the decisions of the Commandant and the law judge are attached.

vessel was approximately 180 miles out at sea. It was further found that appellant had written signs on the doors and bulkheads of the vessel soliciting votes for union office; and that after being relieved of duty and confined to quarters on November 3, appellant subsequently returned to the bridge to "take over" the radio room.

Appellant was advised at the first session of the hearing that the law judge had authority to order him to undergo a medical examination by a physician of the U.S. Public Health Service.[3] He consented to do so and a mental examination was conducted. The report of the examining psychiatrist, dated January 22, 1974, was thereafter received in evidence. This report indicated that appellant was examined by the psychiatrist and a clinical psychologist, and that it was "the opinion of both examiners that [he] should be encouraged not to seek employment at sea, he should be recommended to serve ashore ... as a mate on night duty, etc. on shore while the vessel is in port." It was also recommended that appellant seek psychiatric treatment and therapy; and that he "be referred for re-evaluation in about eight or nine months to determine whether he is showing improvement, and whether he is suitable for active duty on sea-going vessels."

The law judge found that the medical evidence, including the psychiatrist's subsequent testimony, coupled with the evidence of appellant's behavior on the vessel, constituted substantial proof of his mental incompetency. The law judge's order of revocation was entered on the basis of these findings.

Appellant presented no rebuttal evidence, and the only witnesses called from the vessel were the master and chief mate. Their testimony was rejected as hearsay by the Commandant on review. Nevertheless, he affirmed the sanction upon finding that the doctor's "testimony alone is sufficient on which to predicate the ultimate findings in this case."

In his brief on appeal, appellant contends that both the medical evidence and the testimony of shipboard witnesses are subject to exclusion under the hearsay rule; that the medical evidence should also be excluded because it was based on the Coast Guard's prejudicial communications to the doctor in advance of the mental examination; that the law judge erred in failing to consider other sanctions in addition to revocation; and that subsequent events have shown this order to be unnecessary and unjust. Appellant therefore urges that the sanction be vacated and set aside. Counsel for the Commandant has filed a reply brief opposing

[3] 46 CFR 5.20-27.

such relief.

During pendency of this appeal, a petition to reopen appellant's hearing was filed with the Commandant.[4] The petition was supported by a medical report showing that appellant had "neuropsychiatric consultation" with another psychiatrist in October 1975 and was found to have "sufficiently regained his stability to the point ... that psychologically he is now capable of serving in his usual capacity as a mate." This was asserted as newly discovered evidence since it was argued that appellant's condition at the hearing "may not have produced an opinion similar to that which the doctor currently holds". On January 8, 1976, the petition was denied by the Coast Guards's chief counsel, who rejected such evidence "because it is irrelevant to the condition of the petitioner at the time of adjudication." Appellant thereafter filed a further appeal from the denial action.

Upon consideration of the briefs of the parties and the entire record,the Board concludes that appellant's mental disability to perform duties in a licensed capacity at sea, within the timeframe determined by the law judge, was established by reliable, probative, and substantial evidence. Although the findings of the law judge, as modified herein, are adopted as our own, we further conclude that the do not have a requisite sufficiency to sustain the sanction here imposed. The sanction will be modified and the case remanded for a redetermination of appellant's current state of fitness for sea duty.

With respect to the incidents aboard ship, the master testified that upon returning to the bridge after supper on November 3, he observed that the previous course had been changed on the charts and that the course recorder showed the vessel heading left and right for no apparent reasons. After questioning the quartermaster and being told that appellant ordered these movements, the master asked appellant for an explanation. The latter's reply was "I'm doing my duty." Later, the master was told by another seaman on the bridge that appellant gave the standby orders. We see no reason to reject this unrefuted testimony entirely because it contained hearsay.[5] In addition, the vessel's

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[4]Appellant also requested that the instant appeal be held in abeyance while he pursued this additional remedy under Coast Guard regulations. See 46 CFR 5.25-1 seq.

[5]The Commandant did so in view of appellant's objections under a Coast Guard regulation providing that "hearsay evidence shall be rejected if the declarant is readily available to appear as a witness." 46 CFR 5.20-95. Since the hearing was conducted

official log for that date was received in evidence, which records the removal of appellant from duty for these navigating errors, as well as an entry on November 7, which shows that appellant answered the listing of his deficiencies with a one-word expletive.[6] The master's testimony that appellant wrote the signs was based on his observation of handwritten slogans such as "Vote Burke for Local 88" placed on passageways, winches, and the blackboard of the vessel, and his comparison of such handwriting with appellant's entries in the logbook.[7] As to the last incident, the master testified that appellant resisted him directly while attempting to take over the radio room.

Appellant's hearsay objection is that the actions attributed to him were not actually observed by witnesses from the vessel. Even if we disregard those portions of the master's testimony which involved statements of witnesses not called, the quantum of circumstantial evidence is sufficient, in our view, to sustain the findings of the law judge.[8] We have no hesitancy in drawing the inference that appellant was responsible for the incidents on November 3, which were not actually observed by the master, since appellant was in sole charge of the vessel's navigation at the time and in view of his adamant refusal to explain the erratic performance of that function during his watch.

In objecting to the medical evidence, appellant cites Cohen v. Perales, 412 R 2d 44 (5th Cir. 1969), holding that doctor's

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pursuant to the Administrative Procedure Act (5 U.S.C. 556) the Coast Guard regulation cannot be construed as nullifying the general rule that hearsay is admissible. See Willapoint Oysters v. Ewing, 174 F. 2d 676,690-1 (9th Cir. 1949). A more appropriate construction is derived from a further provision of the regulation in question that "hearsay evidence shall be accorded such weight as the circumstances warrant, including consideration of whether it is opposed by other evidence ..."

[6]The logbook entry is admissible as an exception to the hearsay rule under the Federal Business Records Act, 28 U.S.C. 1732. See 46 CFR 5.20-107(a). Since appellant was afforded the right of reply, the entry is entitled to a high degree of weight in substantiating the master's testimony. See Roeder v. Alcoa Steamship Co., 422 F. 2d 971,974 (3d Cir. 1970).

[7]3 Am. Jur. 2d, Expert and Opinion Evidence, § 74.

[8]We attach no particular weight to the chief mate's testimony, which was largely based on information he had received from the master.

reports of medical examinations, admitted as hearsay in an administrative proceeding, do not constitute substantial evidence. Appellant ignores the fact that this ruling was reversed by the Supreme Court in Richardson v. Perales, 402 U.S. 389, 402, 28 L. Ed. 2d 842, 853, 91 S. Ct. 1420 (1971). In any even, the cited precedent is clearly distinguishable since the hearsay rule was applied because of the lack of cross-examination, whereas, in this case, the reporting psychiatrist was cross-examined by appellant's counsel. His objection is thus unfounded.

The further objection that such evidence was "tainted" by the Coast Guard's letter to the doctor is also rejected. Appellant's complaints are that although he consented to the mental examination, the letter indicated it had been ordered by the law judge; and that statement of what the Coast Guard intended to prove as well as the master's unofficial notes "kept ... as a chronicle of [appellant's] behavior during the voyage" were attached. Although the transmittal of such materials appears to have violated the applicable Coast Guard regulation,[9] the doctor's cross-examination shows that they had a quite minimal influence, and that the doctor's report was based primarily on current clinical evaluations and appellant's previous hospital records. Appellant's counsel closed his cross-examination abruptly when the doctor offered to produce these records. Since the issue of prejudice was abandoned in this fashion, we do not deem it worthy of serious consideration on appeal.

Although such hospital records are not in evidence, the doctor's testimony is undisputed that appellant was hospitalized for "emotional difficulties" in 1960 and in 1970. This, coupled with the doctor's report, leaves no doubt about the sufficiency of the medical evidence to establish that appellant's disability persisted at the hearing. Yet, it is equally apparent that this evidence nowhere identifies what the emotional problem was or described its symptoms. Nor did the doctor offer any final prognosis as to the probable duration of the problem or the likelihood of achieving a satisfactory cure. Rather, the report anticipated a further evaluation of appellant's fitness for sea duty in 8 or 9 month. However, the initial decision followed the doctor's report by only 7 months, thereby closing the record before any final prognosis was rendered.

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[9]The Commandant found that the regulation pertaining to medical examinations "calls for a settling of materials to be submitted" to the examining physician (C.D. p. 7). We would agree that such determinations are properly subject to the rulings of the law judge and should be made on the record. See CFR 5.20-27(a).

The sanction of revocation should not be imposed where the medical evidence relied upon as evidence of a mental disability also indicates that it may be alleviated by medical treatment, and that the afflicted person may be restored to active duty within a definite period of time. In this instance, we find the law judge's order excessively premature since he did not even await the results of appellant's reevaluation by the reporting doctor.

The law judge also labored under a misconception in holding that "This is a case in which there [are] just two choices ... either dismissal or revocation...." Neither the applicable statute nor the regulations issued thereunder would so confine his discretion. [10] The reply brief argues that decisions of the Commandant in other mental incompetency cases reflect "the need for revocation as the only proper order..." These decisions involved the affirmance of suspension orders in two instances.[11] In the other instances, revocation orders were affirmed where there was evidence of permanent disability,[12] and where the mental illness caused acts of violence and produced suicidal tendencies.[13] Contrary to the Commandant's argument, this series of decisions indicates that a lesser sanction should be imposed here since no permanent disability was found and there is no showing that appellant's prone to violence.

In assessing the appropriate sanction, we have considered the reporting doctor's certifications, following the initial decision, that appellant is fit for duty as an unlicensed seaman and for service as a night mate. Thereafter, on October 22, 1974, a temporary document to serve in these capacities was granted by the Coast Guard under court order. Finally, on November 8, 1974, the court enjoined the Coast Guard from interfering with appellant's pursuit of such employment "pending the final decision of the Commandant ..., the Department of Transportation and/or the final

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[10] 46 U.S.C. 239(g) authorizes both suspension and revocation actions for incompetence. Since the Coast Guard regulations are silent on the matter of sanction in mental incompetency cases, we presume that the law judges have discretion to enter either order as deemed appropriate.

[11] Appeal No. 897 (Jagodzinski) and 1502 (Williams).

[12] Appeal No. 1087 (Armstrong).

[13] Appeal No. 1677 (Conjar).

order and judgement of [the] court."[14]

From our review of the record herein, we are persuaded that any disturbance of appellant's status under the court order would be ill-advised until his competence to serve in a licensed capacity at sea is redetermined in light of a current medical evaluation.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal be and it hereby is granted in part, and denied in part;

2. The revocation order of the Commandant be and it hereby is vacated and set aside with respect to appellant's merchant mariner's document; and modified to provide for a suspension of appellant's license, reserving to appellant the authorization contained in his temporary document for service as a night mate on vessels berthed in the United States; and

3. The entire proceeding be and it hereby is remanded to the Commandant so that he may further remand the matter to an administrative law judge of the Coast Guard with instructions to reopen appellant's hearing for redetermination of his competence to perform duties at sea in the licensed capacity.

TODD Chairman, McADAMS, HOGUE, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order.

[14]Temporary Injunction issued by the U.S. District Court, Southern District of Texas (C.A. 74-H-1411).